

1 ANDRÉ BIROTTE JR.
United States Attorney
2 LEON W. WEIDMAN
Assistant United States Attorney
3 Chief, Civil Division
DAVID A. DeJUTE
4 Assistant United States Attorney
California Bar No. 153527
5 Room 7516, Federal Building
300 North Los Angeles Street
6 Los Angeles, California 90012
Telephone: (213) 894-2443
7 Facsimile: (213) 894-7819
email: david.dejute@usdoj.gov

8 Attorneys for Federal Defendant
9

10 UNITED STATES DISTRICT COURT
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA
12 WESTERN DIVISION

13 EUGENE EVAN BAKER,) NO. CV 10-3996-SVW(AJWx)
14)
15 Plaintiff,)
16 v.) Date: October 25, 2010
Time: 1:30 p.m.
17)
18 ERIC H. HOLDER, JR.,)
ATTORNEY GENERAL,)
19 Defendant.) Hon. Stephen V. Wilson

20
21
22 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**
23
24
25
26
27
28

1 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I**

3 **INTRODUCTION**

4 Nothing contained within Plaintiff's opposition undermines
5 the grounds set forth in the motion to dismiss. Plaintiff's
6 supplemental facts as to standing and ripeness cannot be properly
7 alleged in an opposition. Moreover, this Court is not free to
8 disregard binding Ninth Circuit precedent which is directly on
9 point.

10 Accordingly, this Court is respectfully requested to dismiss
11 Plaintiff's complaint in its entirety.

12 **II**

13 **PLAINTIFF'S COMPLAINT SHOULD BE DISMISSED**

14 **A. PLAINTIFF'S CLAIM FAILS TO PRESENT A LIVE CONTROVERSY**

15 For the reasons set forth in the motion to dismiss, the
16 claim presented by the complaint is jurisdictionally defective.
17 In his opposition, Plaintiff sets forth facts, for the first
18 time, which *may* be sufficient to confer standing and which *may* be
19 sufficient to present a case or controversy which is ripe. The
20 facts as alleged in the complaint, however, fail to present a
21 live controversy.

22 If Plaintiff believes that additional true facts can be
23 alleged to correct the jurisdictional defects, then he should ask
24 leave of court to amend his complaint to allege those facts. As
25 currently alleged in the complaint, however, Plaintiff fails to
26 set forth a jurisdictionally sound case or controversy, and it is
27 respectfully requested that the complaint be dismissed.

28 ///

1 **B. THE COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN**
2 **BE GRANTED**

3 Any amendment to the complaint to correct the jurisdictional
4 defects of standing and ripeness, however, would be futile, as
5 Plaintiff's complaint would still fail to state a claim. As more
6 fully set forth in the motion, binding Ninth Circuit precedent
7 forecloses Plaintiff's claim. See Jennings v. Mukasey, 511 F.3d
8 894 (9th Cir. 2007). Like Plaintiff, the plaintiff in Jennings
9 claimed that he was entitled to possess and use a firearm,
10 because his prior conviction for domestic violence had been
11 "expunged" by a California court under § 1203.4. Jennings, 511
12 F.3d at 898. The Ninth Circuit held that the state court order
13 under § 1203.4 "did not expunge [the plaintiff's] conviction for
14 purposes of 18 U.S.C. § 922(g)(9).

15 Plaintiff seems to agree that a literal reading of Jennings
16 forecloses his claim. See Opposition, 15-17. Plaintiff instead
17 urges this Court to ignore the holding of Jennings and to issue
18 an order directly contrary to this Ninth Circuit opinion which
19 was recently issued in 2007. See Opposition, 17 ("plaintiff
20 submits that Jennings has no precedential value and should not be
21 followed"). In his opposition, Plaintiff then sets forth all of
22 the reasons that, *in his opinion*, Jennings was wrongly decided.
23 See Opposition, 15-21.

24 Notwithstanding the strength with which Plaintiff or his
25 counsel may hold such an opinion, Plaintiff's legal reasoning is
26 based on cases decided before Jennings, all of which the Jennings
27 court had available to it and which that court is presumed to
28 have considered. The only cases decided after Jennings are two

1 Supreme Court cases which do not overrule Jennings and which the
2 Plaintiff concedes do not directly address the issues presented
3 by this motion. See Opposition, 21.

4 In short, the Federal Defendant has cited a controlling
5 Ninth Circuit case which was recently decided and which
6 forecloses Plaintiff's claims. Plaintiff's only recourse is to
7 urge this court to ignore binding precedent because, in
8 Plaintiff's opinion, the Ninth Circuit wrongly decided Jennings.
9 Respectfully, this Court is not free to ignore a Ninth Circuit
10 decision directly on point.

11 **III**

12 **CONCLUSION**

13 For the foregoing reasons, the Federal Defendant
14 respectfully requests this Court to grant the motion and to
15 dismiss the Plaintiff's complaint with prejudice.

16 Respectfully submitted,

17 DATED: October 8, 2010

ANDRÉ BIROTTE JR.
United States Attorney
LEON W. WEIDMAN
Assistant United States Attorney
Chief, Civil Division

20 /s/ David A. DeJute
DAVID A. DeJUTE
Assistant United States Attorney
Attorneys for Federal Defendant
21
22
23
24
25
26
27
28